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MARCH.

1899.

ANNALS
OF THE
AMERICAN ACADEMY
OF
POLITICAL AND SOCIAL SCIENCE.

THE REGULATION AND NATIONALIZATION OF
THE SWISS RAILWAYS.*

*The Origin of the Law of 1852.—Introduction of the System
of Private Railways.*

During the period from 1813 to 1848 Switzerland was a loose confederacy of small, almost entirely independent, states, whose central government possessed no original powers over internal affairs. It is clear that such political conditions were highly unfavorable for the projection of great public works whose compass would extend far beyond the limits of individual cantons. Indeed, the thirties and forties were continually occupied with political struggles and disturbances which absorbed both the energy of the country and the attention of the government. We can understand why the development of railways began much later in Switzerland than in most other European states if we remember that the country was poor in natural resources, that trade and industry were confined to a few municipal cantons, and that climate and soil offered serious

* Translated from the German by B. H. Meyer, Ph. D., University of Wisconsin.

obstacles to railway construction, technically but imperfectly developed. As a matter of fact, the first railway was not opened until June 15, 1844, and this was a line, 1.8 kilometers long, from Bâle to the French boundary at St. Louis. Three years later, in 1847, followed the Northern Railroad, from Zurich into Baden, with a length of 23.3 kilometers.

In 1848, the federal constitution was so revised as to meet the requirements of the age, and a firm central government placed over the cantons. Although the sovereignty of the cantons remained unimpaired the central government was entrusted with a number of important powers. Article 21 of this constitution provides that:

“The federation shall have power, in the interests of the *Eidgenossenschaft* or of a large part of the same, to erect or to aid in the erection of public works at the expense of the *Eidgenossenschaft*.

“The federation is also authorized to exercise the right of expropriation, full compensation being given. Detailed provisions concerning expropriation are reserved for federal legislation.

“The federal assembly may prohibit the erection of public works which prejudice the military interests of the *Eidgenossenschaft*.”

Upon the basis of this article the federal assembly of 1849 requested the *Bundesrat* to submit to it data upon the following propositions:

1. A plan for a general Swiss railway network, and on consultation with disinterested experts, a plan for undertaking the preliminary technical work.
2. An outline of a federal law concerning expropriation for Swiss railway construction.
3. Opinions and propositions relating to the participation of the federation in the construction of a Swiss railway network.

It was the prime motive of the federal assembly to provide for the systematic and energetic building of railways in Switzerland, leaving open the question whether the state or private individuals should undertake the task.

The *Bundesrat** did as requested. It ordered exhaustive opinions to be elaborated on the technical and financial basis of railway construction, and for this purpose called two eminent authorities from England, Robert Stephenson and Henry Swinburne.

Meanwhile the *Bundesrat* itself brought before the councils an expropriation law, the federal law concerning liabilities for the surrender of private rights, which went into effect on May 1, 1850, and which has remained in force unchanged till the present time. Article 1 of this law stipulates that

“when in accordance with Article 21 of the federal constitution public works are erected on the account of the federation, or when the application of this federal law to other public works has been decreed by the federal assembly, everybody shall be in duty bound, in so far as such public works may necessitate the same, to cede his property or other rights to immovables, temporarily or permanently, in return for full compensation.”

This article contains the essentials of the law, which, in addition, regulates numerous questions of detail and procedure that find their application in the execution of the law on expropriation. With this the foundation for Swiss railway legislation has been laid; for, as we shall see below, the expropriation law was soon declared applicable to railway building in a generally binding form.

During the autumn of the same year (1850) the experts submitted their report. The technical opinions elaborated by the two Englishmen contained a plan for a Swiss railway system, 650 kilometers in length, and recommended the execution of the same by the state. The experts on finance believed likewise that a Swiss railway system could not be brought into existence without the co-operation of the state, but they were divided in their opinions as to the form

* The *Bundesrat* is the federal executive. It is a committee chosen by the federal assembly in joint session. The federal assembly is composed of two chambers, *Nationalrat* and *Ständerat* (national council and council of states), which are frequently spoken of collectively as “*Räte*” (councils).—*Translator*.

which this co-operation should take. One proposed building through the joint agency of the federation and the cantons; the other, building by private individuals with a guarantee of a certain minimum revenue by the state.

Based upon these preliminary estimates, the *Bundesrat* brought a draft of a railway law before the federal assembly in 1851. This law provided for the building of the network of railways, proposed by the technical experts, through the joint agency of the federation and cantons, although the *Bundesrat* asserts in its message* that it would have preferred building by the federation alone had it not been restrained by financial considerations. The pecuniary resources and revenues of the federation were extremely limited, and it was thought at this time that the operation of railways would certainly involve a deficit. It was for this reason that the *Bundesrat* proposed that the designation of the projected lines and the determination of the conditions under which these should be built and operated within the domain of the *Eidgenossenschaft* should be left to the federation (Art. 1); while the construction itself and operation should be the joint undertaking of the federation and of the cantons (Art. 7). This participation was planned in such a manner that the requisite funds were to be raised by issuing Swiss railway partials† upon which the federation was to guarantee a certain minimum rate of interest, while the cantons were to reimburse the federation, to the extent of two-thirds, for whatever contributions it might be compelled to make in consequence of the interest guaranty. Naturally only those cantons would have been drawn into account which were touched by the railway in question. Any surplus above the guaranteed interest was to be participated in by the holders of the partial obligations.

* Propositions relating to laws and resolutions, which the *Bundesrat* submits to the federal assembly, are regularly accompanied by an explanatory report, called a message, *Botschaft*.

† Partial or partial obligations are bonds divided into parts and supplied with continuous numbers. Brockhaus' "*Conversations-Lexicon*."—Translator.

The administration of every individual enterprise was to be undertaken by an administrative council, elected in part by the federation and in part by the cantons, and which was to have appointed a tolerably independent directory for current business. Provisions were also made for concentrating several different enterprises under one administration or directory. In addition, there was to be created a permanent commission, elected by the federation, for the revision of the accounts of all the railways.

Both the national council and the council of states referred this bill to commissions for criticisms and opinions. The national council received its report first. This commission was divided in its opinions. The majority supported the point of view of the *Bundesrat* but went even farther and gave a less qualified sanction to the idea of state control in railway matters. The minority desired to leave railway matters with the cantons or private individuals.

The majority, whose report was a lengthy and excellently written defence of the state railway system, advocated the following postulates: (1) railway transportation is a state business, and the state should raise the necessary capital; and (2) the location and building of the Swiss railway system and its organization for construction and operation are subjects for federal legislation.

These claims were strongly supported upon economic and political grounds. At the same time the majority accompanied the bill of the *Bundesrat* with the draft of a law worked out by its own members. In accordance with this scheme the establishment of the Swiss railway system and its organization for purposes of construction and operation were to be exclusively the concern of federal legislation; the actual construction and operation, however, was to be the common business of the federation and of the participating cantons. The payment of interest on the capital stock, which was to be raised by four per cent federal loans, without sharing the profits with bondholders, was to be borne

equally by the federation and by the cantons. The *Bundesrat* and a general directory subordinate to it were to be the highest administrative organ. The entire network of railways was to be divided into six circuits, each under the direction of an administrative council of from five to nine members—two elected by the *Bundesrat* and the others by the cantons in proportion to their participation in the enterprise; and each administrative council was in turn to elect a directory for its circuit.

The minority of the commission attempted to refute the arguments of the majority report in favor of a state system and to prove that the building of railways for Switzerland through private means, without any assistance from the state, was not only possible but extremely advantageous. Like the majority, the minority embodied its views in the form of a bill which need not be discussed here because it formed the foundation for the first railway law, the contents of which will be presented below.

The national council decided in favor of private enterprise, accepted the report of the minority by a vote of 68 to 22, on July 8, 1852.

In this manner "The Federal Law concerning the Construction and Operation of Railways in the Domain of the *Eidgenossenschaft*," of July 28, 1852, was enacted. The law remained in force unchanged till 1872. This interval of twenty years may be regarded as a closed period in the history of Swiss railways, especially in the history of the relation of the railways to the state. It is characterized by the supremacy of the cantons in railway affairs. The powers reserved to the federation are very insignificant. But since the cantons were small and weak they soon realized their inability to exert an appreciable influence on the development of the railway system. The companies, which, of course, were organized, in the face of the apprehensions of the majority of the commission of the national council, soon learned how to withdraw themselves from the

guardianship of the cantonal governments; but the federal government, in spite of its insignificant powers, did not lose sight of them. In proportion as the companies grew larger and more influential, as the railway network was enlarged and extended, as traffic increased in volume and significance—which it did at a rate that no one had anticipated—the necessity for a change in federal legislation and for greater supervision and participation in railway matters on the part of the state increased. This development received its last complement in the federal law of October 15, 1897, which ordered the repurchase of the railways. It is a long step between the laws of 1852 and 1897. It is necessary to follow out here the manner in which the revolution in public opinion with reference to the relation of the state to railways was gradually brought about, in order to show subsequently how legislation developed harmoniously with these changes.

The Development of the Idea of State Railways.

Article 1 of the railway law of 1852 reads:

“The construction and operation of railways within the domain of the *Eidgenossenschaft* is left to the cantons, or, when suitable, to private activity.”

while Article 1 of the law of October 15, 1897, says:

“The federation may purchase and operate on its own account, under the name of ‘Federal Swiss Railways,’ all those Swiss railways which, because of their economic or military significance, serve the interests of the *Eidgenossenschaft* or of the major part of the same, when these can be acquired without making disproportionate sacrifices.”

To be sure, there were private Swiss railways before the law of 1852, and such will probably exist following that of 1897, because it will be several years before the transfer of the railways to the federation can be made possible. Yet we may designate the two laws just cited as boundary posts which mark off the system of private railways.

The development of these forty-five years was neither sudden nor spasmodic. The idea of state railways had succumbed, but it had not been destroyed. As early as 1857, on the occasion of a report to the *Bundesrat* relating to Swiss railways, the department of post and building incidentally discussed the question of repurchase and submitted the following propositions:

1. The repurchase of the Swiss railways by the federation is desirable as a matter of principle.

2. In consequence of the above mentioned joint proceedings this repurchase is to be attempted immediately; and, in this case, proposals are to be submitted to the companies in accordance with one of the three following systems: (*a*) shareholders may exchange their stock for government bonds bearing a fixed rate of interest and redeemable within a certain number of years; (*b*) or, there may be granted to shareholders, in addition to the stipulated rate of interest on bonds, a portion of possible surplus revenue for a definite number of years; (*c*) or, instead of this portion of the surplus revenue a fixed annual sum, *e. g.*, one-half per cent of the total capital may be paid to shareholders in lottery premium certificates.*

3. There shall also be kept in view, even at the present time, the repurchase of the railways at the expiration of the first period of thirty years for which charters have been granted, and for this purpose the following provisions shall be made: (*a*) there shall be paid annually into the federal treasury a certain sum which shall constitute a repurchase and amortization fund; (*b*) this repurchase fund shall be applied to the acquisition of Swiss railway stock rather than be put out at interest; (*c*) in case of a possible general fusion the federation shall strive to assume all new stock which may be issued.

This movement did not make further progress. Its purpose appears to have been accomplished with the conclusion of the deliberations of 1852. The expectations of the friends of private railways were being fulfilled in a brilliant

* The author uses the term *verloosenden Prämien*. These "premiums" are obligations or bonds issued for loans, the payment of interest upon as well as the amortization of which "ensues in part or entirely in accordance with a definite scheme of drawing on the lottery plan." The holders of these obligations are paid off whenever the bond which they own is "drawn" by lot. Compare Brockhaus' "*Lexicon*."—Translator.

manner. In a few years there came into existence an extensive network of railways which overspread nearly the whole country, and which was much more dense than the system of state roads that the federation had originally projected.

The first vigorous voice which again was raised in behalf of a state system was that of Stämpfli, president of the federation, who, in 1862, in a pamphlet which attracted an extraordinary amount of attention, advocated the repurchase of the railways by voluntary agreement with the companies. As early as 1857—and this is but little known—Stämpfli had presented a memorial to the *Bundesrat* in which he explicitly supported repurchase. This body, however, gave no support to his propositions.

Stämpfli, well known later as president of the tribunal of arbitration in the Alabama claims of the United States against Great Britain, maintained that the existing railway conditions were unsound and that the excessive scattering of energy was injurious to society, to the public and to the state. He declared, however,

“in order to avoid every possible misunderstanding,” that “because of the nature of existing charters repurchase is possible only by means of voluntary agreements, and that no other method has entered my mind.”

Yet such a repurchase was to be attempted forthwith. It is true, Stämpfli's voice, which was persistently interpreted as a purely private utterance, died away without any direct results; but the impression which his keen project had made and the authority which the great statesman justly enjoyed, long remained so influential that every movement in behalf of nationalization was attached to Stämpfli's name, and every possibility of repurchase according to charter provisions appeared to be excluded for all future time. As a matter of fact, no serious proposition for the accomplishment of nationalization on the basis of the respective charter provisions was made until the year 1897, when the idea

was realized. The state became only gradually conscious of the advantages which had been placed in its hands when it had been authorized to legislate for repurchase in accordance with charter provisions.

Stämpfli made nationalization a positive quantity. His pamphlet shortly called forth a series of replies, which he met in a second edition. His ideas also found independent supporters who sought to elaborate his views and to give them a more practical form.

Meanwhile the period of excessive zeal for the extension and development of the Swiss railway system had been followed by a season of business depression, a general railway crisis, which affected not only all railway companies but also the financial interest of most remote sections of the country. During this critical period the eyes of many were once more turned toward the state, and the acquisition of the railways by the federation—be this by way of agreement or of expropriation (Dietler, 1877), or even in the form of state operation with private ownership (Zschokke, 1877)—was again characterized as the safest way out of the then existing unhealthy conditions in railway affairs. It can furthermore not be doubted that if the state, during this period of depression, had followed the advice of experienced and far-sighted men and acquired the most important lines of railways, it would have come into possession of a great network on remarkably favorable terms.

The state did not venture to take this step. The notion of state railways had not yet struck root either in the leading circles or among the masses. The political ideas obtaining at that time did not tend toward a considerable increase of the federal power; likewise the economic views of the times were overwhelmingly averse to increased state interference in industrial matters. For this reason, on June 6, 1877, the council of states rejected a bill which provided as follows:

“The *Bundesrat* is requested to subject the question of what, if any, changes are to be made in the existing railway legislation in the light of recent experiences in Switzerland, to an exhaustive investigation; and in case the *Bundesrat* should conclude that public interests demand a modification of the laws, it is requested to accompany its report by a suitable bill.”

On June 19, the council of states approved the following motion:

“The *Bundesrat* is requested to order an investigation which may determine whether in view of past experiences and of the present state of affairs it is expedient for the federal government to inaugurate reforms in Swiss railway affairs.”

There was a lack of courage and confidence. The situation of the railway companies appeared to be too critical and hazardous to make it desirable to put the federation in their place. It was thought that enough had been done through the laws of 1874 concerning railway mortgages and forced sales, the transportation law of 1875, the adoption of uniform transportation regulations in 1876, and the law of 1878 relating to the subvention of Alpine railways. The reorganization of the Swiss railways was left to private initiative and private capital just as had been done twenty-five years earlier when the first railways were built.

It can not be said that people were deceived in their expectations. Thanks to the strenuous endeavors of administrative officials, the manifold support of foreign capital, and the favorable influence of the Gothard Railway which had meanwhile been opened for traffic, an improvement in the conditions of most of the railways was perceptible in a relatively short time.

After the *Bundesrat* had relinquished, in 1877, repurchase on the basis of voluntary agreements or by means of expropriation legislation, it was soon confronted by the question as to what attitude it should take toward the repurchase of a number of railways whose charter limits expired on May 1, 1883.

A thorough examination of the circumstances, inspired perhaps still by the influence of Stämpfli, convinced the *Bundesrat* that it was not best to take advantage of its right of giving notice of intent to purchase at this time.* In the message that accompanied this resolution when it was submitted for the approval of the councils, the *Bundesrat* very urgently called attention to the difficulties involved in the repurchase of railways according to charter provisions. It pointed out, especially, the indefiniteness of the two fundamental notions, "capital stock" (*Aulagekapital*) and "net profits" (*Reinertrag*), and the impossibility of accepting the accounts of the railway companies as a basis for the determination of the purchasing price.

The council of states approved the resolution of the *Bundesrat* on April 4; and the national council did the same on the twenty-first of the same month, although it did so by a vote of only 67 to 59. Indeed, the majority of the commission, to which the investigation had been entrusted, reported in favor of the purchase of at least the Swiss Central Railroad and its associated lines.

This momentous problem of repurchase was not yet thought to be sufficiently clarified to be solved in the affirmative contrary to the best judgment of the *Bundesrat*. But apart from this, economic and political doubts concerning the principle of state railways were yet so strong that the council of states would hardly have given its approval to a resolution of the national council in favor of nationalization. The proceedings in this matter brought to light very clearly the fact that the rank and file of those who were fundamentally opposed to a state railway system had become more enlightened. Hereafter, men scarcely dared openly to announce themselves as unqualified opponents of a state system, but rather strove to push the practical difficulties into the foreground, and thus make it unnecessary for them to commit themselves on the question of principle.

* Federal resolution of March 6, 1883.

This gradual change in opinion was naturally intimately associated with the contemporaneous change of views concerning the relation of the state to the public economy. The statesmen and politicians of the year 1883 were even then inclined to extend the activity of the state much farther than would have been considered admissible thirty years previous. Faith in the superiority of absolute freedom of the individual in the domain of economic phenomena, which had been considered the inseparable correlate of political freedom, had been greatly shattered. Men had begun to reconcile themselves to the interference of the state in all spheres of practical life. The activity of the state in promoting trade and the public defence, agriculture, industry and especially labor, education and sanitation; in regulating and correcting the flow of water in meadow and mountain; in extending streets and Alpine paths, and the telegraph and postal service; and, last, but not least, the extended powers which the state already possessed in the domain of railway transportation—about which more will be said below—no longer permitted the transfer of the railways into the hands of the state to appear as an innovation having deep and fundamental significance. Only the practical question *how* was left unanswered.

Of course, the attitude of foreign countries toward railway problems was not unnoticed and it created a lively impression and lasting influence on the views of influential persons and on the opinions of the people of Switzerland. It was during these years that a strong tendency toward nationalization of railways asserted itself over the entire European continent.

Belgium, which had accepted the principle of state roads at the outset, but had subsequently, for reasons of expediency, left the extension of its railway network to private activity, carried out most vigorously the policy of repurchase from 1870 to 1880. Of the total mileage of Belgian

railways in 1870 there were in the hands of the state about 43.5 per cent, or 745 kilometers; in 1880 this had increased to $65\frac{1}{4}$ per cent, or 2568 kilometers; and in 1888 it reached $72\frac{1}{4}$ per cent, or 3200 kilometers.

In Prussia the nationalization of railways was vigorously prosecuted after the year 1876. From this date to 1890 the state acquired about 14,000 kilometers of private roads; and of these upwards of 10,000 kilometers were taken between 1876 and 1884.

Austria, which at one time had shifted from state to private operation, likewise changed its railway policy during this period; and, by enacting the law of December 14, 1877, inaugurated a new epoch of state railways. By the close of 1879 the state had acquired 950 kilometers of private roads. At the end of 1892 this network had been increased to 7581 kilometers, partly by the purchase of existing railways, partly by building new lines and partly by the of operation private roads.

Hungary, whose state system embraced 603 kilometers in 1872 and twenty years later 9810 kilometers, pursued a similar policy.

In France, after protracted debates, in 1877, the legislature authorized the government to purchase a number of lines, mostly suffering ones. A system of 2615 kilometers passed into the hands of the state in 1878.

Likewise the countries bordering Switzerland on the north—Baden, Württemberg and Bavaria—possessed a part of their railways from the first, and they changed over to a state system during this same period.

These events must have exerted a strong influence in Switzerland. They did not permit the movement toward nationalization to come to a halt. The movement also gained a powerful friend in Welti, for many years the director of the department of railways and a member of the *Bundesrat*. He used his influential position with much effect to promote the policy of nationalization.

Attempts at Nationalization previous to 1897.

Since repurchase in accordance with charter provisions was considered too difficult, the *Bundesrat* attempted to approach the desired aim by way of voluntary purchases. During December, 1887, the *Bundesrat* consummated an agreement for the purchase of the Northeast Railroad. In accordance with this agreement the Northeast Railroad Company was to cede to the federation all its movable and immovable property and receive in return, at their nominal value, Swiss (*eidgenössischen*) bonds bearing $3\frac{1}{2}$ per cent interest, at the rate of 600 francs for each preferred share and 500 francs for every common share. The general meeting of shareholders ratified the agreement but demanded additional concessions, apparently of little significance. The *Bundesrat*, however, seized upon this opportunity to withdraw from the negotiations, presumably because of its solicitude about securing a majority vote in the federal assembly.

A few years later they went one step farther with reference to the Jura-Simplon Railroad. After the *Bundesrat* had reserved for itself the right, when the fusion of the *Suisse occidentale* and the Jura-Bern-Luzern railway companies had been brought about, to exempt all shares which it might eventually possess from the restriction on voting in the general meeting (according to Swiss law not more than one-fifth of the whole number of votes can be concentrated in the same shareholder) it resolved, in 1890, to purchase 30,000 preferred shares of the above company, which were at that time owned by the canton of Bern. The purchasing price amounted to 600 francs (per share of 500 fr.), *i. e.*, 120 per cent, payable in 3 per cent bonds quoted at 90. Similar purchases were repeated, so that by the close of 1891 the federation possessed 77,090 preferred shares of the Jura-Simplon Railroad. Financially the result was not

favorable, and the anticipated influence on the authorities of the Jura-Simplon Railroad was not secured; consequently no additional purchases of this stock were made after 1891.

A third trial was made with the Central Railroad. The *Bundesrat* negotiated at first with an association of shareholders of the company concerning the cession of a large installment of stock, and later with the directory itself for the purchase of the entire railway. In June, 1891, the federal assembly empowered the *Bundesrat* to execute a contract for the transfer of the Central Railroad at a price of 1000 francs for every share of 500 francs payable in 3 per cent bonds quoted at par. However, these terms seemed so unfavorable for the federation that the referendum was resorted to, and, on December 6, 1891, the contract was rejected at the polls by a large majority.

These consequences demonstrated more clearly than had at first been assumed that not only a certain aversion to the principle of nationalization but also, and much more, the special conditions of a concrete case condemned the bill.

As early as January 29, 1892, the federal assembly passed a resolution requesting the *Bundesrat* to institute a comprehensive investigation of the railway problems (railway reform and railway repurchase) and to submit a report, accompanied by a bill, on the ways and means by which to proceed.

The outcome of this investigation, which the *Bundesrat* soon took in hand, was the accounting law (*Rechnungsgesetz*) submitted November 2, 1895. The *Bundesrat* had reached the conclusion that the accomplishment of nationalization was desirable, that the next possible opportunity for repurchase in accordance with charter provision in 1903 was preferable, but that existing laws were inadequate for the solution of preliminary problems, such as the determination of the price, etc., and that therefore they must be amended.

This accounting law is the last link in a long chain of legislative enactments through which the relation of the state to the railways has been gradually modified in the direction of increased state influence. The laws are an expression of the gradual development of the idea of state railways. Nearly all these laws, except the last and the most decisive one, were passed without appreciable opposition, and this is proof that their tendency on the whole ran parallel with the transformation of public opinion on the economic functions of the state. When finally the last step, the change to the state system, was to be taken, it was found that the way had long been prepared.

Guided by this legislation we may now study the relation of the state to railway companies up to the time of the enactment of the repurchase act.

Railway Legislation from 1852 to 1872.

The expropriation law of 1850 has already been mentioned. It was the first result of the task which the federal assembly had assigned to the *Bundesrat*, and which was discussed above.

The next and most important consequence of the same report was the "Federal Law Concerning the Building and Operation of Railways in the Domain of the *Eidgenossenschaft*," of July 28, 1852. It was modeled, as has already been stated, after the minority report of the commission of the national council. The following were the essential contents of this law:

The building and operation of railways in the domain of *Eidgenossenschaft* is reserved to the cantons, or to private activity.

Charters for railway enterprises emanate from the cantons, subject to the approval of the federation through the agency of the federal assembly (Art. 18).

The federation must grant this approval if the projected enterprise does not prejudice the military interests of the *Eidgenossenschaft*. But it has the power to decide whether this is the case or not. So far as the author knows, it has never happened that railway charters have been refused for purely military reasons, even though apprehensions of this nature have repeatedly been uttered in discussions on applications for charters.

The law, however, makes the granting of charters depend upon the fulfillment in favor of the *Eidgenossenschaft* of certain conditions relating to the administration of the postal system, the telegraph and the army. They are the following: (1) Railways are bound to transport free of charge letters and sealed packages up to a weight of 5 kilograms. Likewise railway post-offices and postal clerks must be carried gratis. (2) Railways are required to permit the establishment of telegraph lines along the railways without compensation, to direct and supervise the construction and the more important repairs of such lines through their own engineers, and by means of their own staff to make lesser repairs and to maintain the line. (3) Railways are compelled to transport the *Eidgenossenschaft's* army and accoutrements of war at one-half of the lowest regular rates.

In addition, the *Bundesrat* reserved the right to declare a charter null and void if the work of grading was not begun within a specified time and proof given of the company's ability to execute the work in a proper manner. It also reserved the right to prescribe regulations that might be necessary to insure the technical unity of the Swiss railway system. The *Bundesrat* further reserved the right to decide disputes among railway companies over the manner of making junctions with one another. The law provided that every railway company should be in duty bound to permit the establishing of convenient junctions, without the company requiring the rates of the roads making the junctions to be kept at a lower level in its favor.

Finally the *Bundesrat* reserved the power to participate in the negotiations between the cantonal governments and private parties concerning the granting of charters, which right it has, however, never exercised, because the law did not accord to it a dominant position in these negotiations. In case a canton should attempt to prevent or to make more difficult the construction of a railway of importance to the public, the federal assembly was empowered to interfere of its own accord and to order what seemed necessary. It is not very clear just what was to be understood by the "necessary" which, under such circumstances, the federal assembly was empowered to order; and it is at least very doubtful whether the establishment of railways by the *Eidgenossenschaft* was intended.

As compensation for these responsibilities the railways were empowered to apply the expropriation law of 1850 everywhere in the domain of the *Eidgenossenschaft*; besides they were to be allowed to import for a period of ten years, free of duty, rails and other materials required in railway construction, such as wheels, axles, locomotives and coal.

The law was not sufficiently precise in such important provisions as those relating to repurchase. It was content with retaining the possibility of repurchase by the *Eidgenossenschaft* and postponed to a subsequent date the adoption of specific terms. Article 14 of the law provided that

"the time limits at the expiration of which the federation may purchase for full compensation the railway in question, together with the material and supplies belonging thereto, and the terms upon which repurchase may take place, shall be determined from time to time and for each case by itself."

It was clear that the federal assembly would soon be forced to take a stand on this question of charters. As a matter of fact, during the very session in which the railway law was enacted a series of cantonal charters were introduced for its approval.

These bills related to railways that had been chartered by the authorities of the cantons of St. Gallen, Thurgau, Waadt and Luzern. During the discussion on the applications for these charters the friends and foes of a state system contended with vigor. Some sought to incorporate in the resolutions approving the charters provisions which would make it easy and advantageous for the state to repurchase the railways; others took pains to give the longest possible life to the system which they had only recently created.

Various bills designed to solve these difficult problems were brought before the federal assembly. The *Bundesrat* proposed to fix the terms of repurchase in the following manner:

“The federation shall have power to acquire, for full compensation, all railways, together with the materials, buildings and supplies belonging thereto, after the twentieth year of the operation of the same, and on giving the respective railway companies one year’s notice.”

But the federation could not make use of this right before the expiration of the charter period, which was fixed at ninety-nine years.

The amount of compensation was to be ascertained exclusively on the basis of (*a*) the average net profits of the road during the last twenty years; (*b*) the original capital stock of the road and of its dependent lines; (*c*) the estimated sum which the construction and equipment of the road would cost at the time of purchase.

From the sums paid by virtue of *b* and *c* a reasonable deduction was to be made as an allowance for the past wear and tear of the railway. Should the federation desire to exercise its right of repurchase before the expiration of the charter limits—that is, between the twentieth and ninety-ninth years—then the price was to be advanced ten per cent. When an agreement between the federation and a railway

company could not be reached, a court of arbitration was finally to fix the purchase price on the basis outlined above.

The council of states first deliberated upon the bill, and, with unessential modifications, approved the scheme of the *Bundesrat*. The national council, on the other hand, engaged in a lively discussion which finally led to the adoption of the following repurchase clauses:

1. The federation shall have power to repurchase a railway at the termination of the thirtieth, forty-fifth, sixtieth, seventy-fifth and ninetieth years, and at the expiration of the charter in ninety-nine years.

2. As an indemnity against the exercise of this power there shall be paid twenty-five times the average net profits for the ten years immediately preceding the repurchase in the thirtieth, forty-fifth and sixtieth years; in the seventy-fifth year twenty-two and a half times, and in the ninetieth year twenty times this average; but in all cases an amount equal at least to the original capital stock shall be paid. Repurchase in the ninety-ninth year should be made by a reimbursement equal to the probable cost of the road at that time.

3. The road was to be transferred in a thoroughly satisfactory condition; and should it not meet these requirements a corresponding reduction was to be made from the amount awarded as an indemnity.

4. Disputes as to the amount of the award were to be submitted to a court of arbitration composed of two members appointed by each of the parties in the controversy, and these four were to choose a fifth as chairman. Should the arbitrators fail to agree upon a chairman the *Bundesrat* was to nominate three persons from whose number the plaintiff might first strike out one, then the defendant another. The remaining nominee was to be the chairman.

These propositions were finally approved by the council of states and this approval laid the foundation of Swiss railway legislation for many years to come. The law, whose contents have been indicated above, fixed the rights and duties of the state toward the railways. It still required elaboration. The adoption of the repurchase clauses was the first step in this direction. These, however, did not constitute a part of the law, but were merely resolutions of the federal assembly which were incorporated in the acts of

the federation for the approval of cantonal charters. After an agreement had been reached concerning the contents of these charters the resolutions were applied in tolerably uniform manner for all charters of standard roads granted by authority of the first railway law.

All further regulation of the legal relations of railways, in so far as they had not been provided for by the federal law of 1852, was left to the cantons.

In this connection it is, of course, quite impossible to enter upon a more detailed account of the manner in which the cantonal governments made use of their legal rights in the domain of railway affairs. The results of the exercise of these rights, however, are very small and their practical effect a vanishing quantity. In the nature of things the tendency would be not to obstruct the construction of international railways by means of exhaustive legal provisions which, because of the great difference in the conditions in the various cantons, could not well have been enacted.

The cantonal charter acts, on the other hand, were much more detailed and thorough. As a rule they contained careful directions concerning the approval of plans and the beginning, duration and nature of the construction. They required all plans to be submitted to the government. The construction of passenger coaches, the number and speed of trains and maximum rates were prescribed and provisions made concerning the policing of the railways. The companies were required to charge equal rates for all, and to grant favors to no one which could not be secured, under the same circumstances, by everybody else. A transfer of the charter was usually dependent upon the approval of the cantonal governments. The cantonal governments also reserved special rights of repurchase, modeled after those of the federation, but naturally inferior to them. The Canton of Bern alone exercised this right to a considerable extent, and it later sold its roads to a private company. The

railways, however, in addition to considerable financial support, received from the cantons numerous favors, two of which have special significance. One was the assurance that no other road should be chartered in the same direction or region; the other, exemption from cantonal and communal taxes. (The *Eidgenossenschaft* levies no taxes.) The "monopoly rights" against other roads led to numerous complications and later on, after the power to grant charters had been vested in the federation, the *Eidgenossenschaft* declared them not binding. Roads upon which the right of exemption had been bestowed at that time still enjoyed this privilege. Up to date the federal courts have defended them in the possession of this right against all attacks of the cantons; and since the railway companies have been placed in fair and, in some cases excellent, financial condition, these attacks have not been wanting.

Lastly, most of the cantonal charters took advantage of the right which the law of July 19, 1850, concerning exemption from military duty, had conceded to them, a law exempting railway engineers and machinists from military service. Experience, however, soon demonstrated that this exception to the principle of general military duty did not adequately meet the needs of the traffic; and so, by a federal resolution of July 20, 1853, the *Bundesrat* was authorized to determine for each railway separately, who among the employes, upon whom devolved the care of the safety of operation, should be released from the performance of the general military duties. This permission was granted only with the greatest possible restrictions, but with the introduction of the new military organization, exemption has been extended to all persons employed in the operation of railways.

These conditions can in nowise be characterized as ideal but the Swiss railways developed at a moderate rate. The demand for the new means of transportation had so long been checked by the unfavorable political and social conditions that, as soon as a certain degree of stability had been

brought about, the development of the net began. However, the legislation of the federation followed this development rather hesitatingly.

To carry into effect the provisions of Article 12 of the Railway Law, the *Bundesrat*, in 1854, issued an "Order Concerning the Technical Unity of Swiss Railways" which contained rather careful directions aiming to secure the greatest possible uniformity in construction and equipment. This order regulated the width of track, the radius of curvature, the height in the clear of tunnels, the maximum height and width of cars, the distance between wheel centres, the width of rims, etc. This unification of the equipment on Swiss railways was considered a military necessity.

The federal assembly took no further action regarding railway affairs for several years. In 1858, it declined to pass a bill relating to the regulation of the conditions of exclusion from Swiss Railways which the *Bundesrat*, in carrying into effect Article 13 of the law of 1852, had brought before it, because the *Bundesrat* possessed the necessary power to regulate those conditions "in the interests of the public traffic, the public service, as well as of the most efficient operation of the roads." So, also, in 1863, when numerous petitions had been presented from the business circles of several cantons praying for the removal of various evils connected with transportation on the Swiss railways, this body refused to act. This refusal was made because it was thought that a recent agreement among the different railway companies on uniform regulations would meet most of the complaints ; also because it was the duty of the cantons rather than of the federation to interfere. The federal assembly also thought that the *Bundesrat* would be able to deal with such complaints should they continue to be made.

It is to be noticed that the federal assembly remained opposed to state interference in railway matters, although the people generally were demanding this interference.

This resolution of the national council was passed during the presidency of Alfred Eschers who was spokesman for the minority of the commission of the national council in 1852 and had defeated the idea of state railways.

But circumstances are more powerful than men. The federal assembly could not long resist the current of public opinion. During the summer of 1869, it requested the *Bundesrat* to submit a report and a bill granting additional powers to the federation in relation to the operation of railways.

At this juncture an event happened which not only contributed powerfully to direct public opinion towards the desirability of the participation of the state in railway transportation, but also showed to the federal assembly that, at least, under certain circumstances the state could not and dared not stand idly by and quietly watch the development of the railway system. In the extension of the network of Swiss railways the task of building over the Alps presented itself and proved too great for the combined efforts of the cantons and private persons. The *Eidgenossenschaft* had to conduct the diplomatic negotiations with foreign countries which were to aid the work by the granting of subsidies.

By the treaty of October 15, 1869, between Switzerland and Italy, which was later on accepted also by the North German Federation, the foundation of the Gothard enterprise was laid and at the same time powers were entrusted to the Swiss *Bundesrat* to execute the provisions of the treaty by means of the Gothard Railway Company. These powers gave the *Bundesrat* a very different position in relation to railway affairs than it had hitherto held.

The *Bundesrat* objected to the creation of two kinds of railway law, one for the Gothard Railway and the other for all the remaining railway companies; and hence it gladly responded to the invitation of the councils to submit the draft of a new railway law (1872) that would unify the railway code.

The Gothard Railway thus became one of the most important immediate causes that brought about an extension of the rights of the state in railway control. It is a most peculiar coincidence that for the many years of his restless activity for the inception of the Gothard Railway Alfred Eschers received a reward which rarely comes to an individual. The most pronounced and proudest champion of the independence of the railways from the state, the spiritual father of the railway law of 1852, now, without intending to do so, gave the most important impulse toward the new railway law of 1872.

The Railway Law of 1872.

The *Bundesrat* presented the draft of a new law together with a very elaborate report to the councils in 1871. This report characterized as an especially great evil the inability of the individual cantons to assert their authority against the greater railway companies. As a result of this inability there had arisen a series of misunderstandings and conflicts over the establishment of new lines or their transfer to third parties, over the regulation of junctions, the lack of harmony in time tables, rate questions and the arbitrary action of the companies in cases of liability. All these misdemeanors could be brought to an end only by the strong hand of the central government.

This report scarcely exaggerated existing conditions. There was the greatest incoherence in Swiss railway regulations because of inadequate federal legislation. There had clung to Swiss railways from the beginning a strong particularism and an inability to renounce, for the sake of the simplification and unification of its administrative machinery and traffic regulations, claims which were more or less just. The public was all the more inconvenienced by these conditions because the lines of the

individual companies were less extensive and their most important roads were only sections of prominent through routes. In this respect, however, conditions were improved little by little, partly through the consolidation of smaller companies; partly by the direct pressure exerted by the trafficking public or the state, and not least, by the continued exertions of far-sighted professional men. Nevertheless it is certain that the weakness of the railway companies and their inability to unite interests diverging in so many directions became fatal to them. They supplied the state with a welcome argument for, and a certain justification of the uninterrupted extension of its authority in the domain of railway affairs.

From the beginning the railway companies had denied to the federation the right to alter their legal status through legislation because this status rested on a private contract—the charter. In its message the *Bundesrat*, however, took a very decisive position against this conception by asserting that charters are one-sided acts of the state power which may be repealed or modified by the same authority. Nevertheless, it admitted that certain private rights grew out of charters which could not equitably be annulled without compensation. Such, however, were not in question here, because the *Bundesrat* was now dealing with provisions for the maintenance of public order, for the protection of individual rights of public traffic, of the safety and health of the people, and that all individuals, associations and corporations as well as the private citizen must be subordinated to these higher interests of civil society.

The law as it finally emerged from the federal assembly on December 23, 1872, is in four parts:

1. The granting of charters.
2. Contents of charters and the legal status of the incorporators.
3. Provisions concerning the unity of construction and operation of Swiss railways.
4. Questions of jurisdiction and transitional regulations.

As regards the granting of charters, power is to be exercised solely by the federation which must, however, previously consult with the cantons. The federal assembly may refuse to grant charters for railways which prejudice the military interests of the *Eidgenossenschaft*. A charter may be granted even against the protests of a canton, but in such a case the canton has a right to build and to operate the railway in question on its own account. The law stipulates that charters shall be granted only for limited periods of time and shall contain no rights of exclusion. The regulations of the railway companies, as well as every alteration of the same, require the approval of the *Bundesrat*. Charters are transferable only with the consent of the federation. The execution and authorization of liens on railways and the procedure in case of insolvency shall be regulated by a special federal law. The expropriation law applies to all chartered railways. A period of time shall be fixed within which the work of grading must be begun and evidence given of ability to continue the same under penalty of forfeiting the charter. (In practice, no objections were, as a rule, raised against an extension of this time limit on the application of the incorporators.) The *Bundesrat* shall also fix a term of years for the completion of the road, in violation of which, unless an extension is granted by the federal assembly, the same shall be sold at auction on the account of the company. All plans must be submitted to the *Bundesrat* for approval. This body has the right, in the interests of public safety, of traffic and of public defence, to order the construction of double tracks, new stations, etc. The federal assembly decides upon these matters in the last resort. For all demands exceeding the legal and concessional requirements the companies shall, within certain limits, receive compensation. During the period of construction and operation the railway company shall, at its own expense, take all measures necessary for the safety of traffic on existing highways, etc., and for the

protection of adjacent property from injury. The railway shall not be opened for traffic until after the *Bundesrat* shall have granted permission to do so. The *Bundesrat* shall previously authorize experts to inspect the road at the expense of the company. Following the completion of the road, plans and an inventory of the entire plant, in addition to a correct account of all expenses, shall be handed in to the *Bundesrat*. The same shall be done for later construction not falling under the head of maintenance and for the purchase of equipment. Railways are bound to transport mail free of charge. The federation may collect annually a charter fee proportionate to the net profits. In case of interruptions in traffic due to accidents provisional transportation of mails and passengers shall be provided for. The provisions relating to the construction and maintenance of telegraph lines are analogous to those of the law of 1852. In times of war the federation is authorized to take possession of the railways with all their equipment, compensation being given. During times of peace the army and accoutrements of war shall be transported at one-half the ordinary rates. Every year the companies shall transmit to the *Bundesrat* reports of their annual meeting, extracts from the reports of the general meeting of shareholders, and all material necessary for the compilation of statistics. The more detailed provisions concerning repurchase are to be stipulated in the charters. On non-fulfillment of legal and concessional obligations and the observance of a certain mode of procedure, a charter may be declared void and the road, together with its equipment, sold at auction on the account of the company.

The law further gives (Art. 29-38) the federation extensive powers for the establishment of unity in the construction and operation of Swiss railways. They extend to construction, equipment, manner of building, heating, lighting, condition of cars, minimum of equipment required of every railway, railway police, number of trains and

observance of train regulations, the adoption of uniform traffic regulations. Rates were completely subordinated to the control of the federation, which asserted the right to inspect all acts and contracts relating thereto. Nevertheless, the *Bundesrat* acknowledged in a message that rates were regulated less by the directions of the state than by the demands of traffic. Consequently it based its regulations on the two principles that all rates must lie within concessional limits and that no tariffs, not provided for in the charters, can be collected unless they have been expressly approved by the *Bundesrat* and publicly announced. Such publication, which is required for all changes in rates, shall be made at least fourteen days before the rates in question shall take effect. Finally, the federation reserved the power to legislate on matters pertaining to freight regulations and to the liability of railways for deaths and injuries connected with the construction and operation of the railways.

Such were the main provisions of the new railway law. They demonstrate that the federal assembly which enacted this law no longer occupied the ground of the federal assembly of 1852. The state at this time interferes vigorously with matters which twenty years before had been considered within the exclusive domain of private interests.

This law, however, did not terminate Swiss railway legislation; it was rather the first step in a new direction.

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—THE EDITOR].